In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 367

UNITED STATES OF AMERICA, APPELLANT

v.

CONTINENTAL CAN COMPANY AND HAZEL-ATLAS GLASS COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

The Solicitor General acknowledges, and greatly regrets, his error in citing, in the jurisdictional statement, a number of supposed "exhibits" that were in fact never admitted. The mistake has no bearing whatever on the merits of the present case, but unfortunately it raises doubt as to the uniform reliability of the government's court papers. Because of our awareness of the general importance of maintaining that standard, this reply will first describe the specific measures being taken to avoid repetition of the error. Next, we will show that the errors do not affect the substance of the issues in this case, because the facts that the documents were cited to demon-

707-741—63

strate were amply proved by evidence as to which there can be no contest. Finally, we deal briefly with appellee's argument on the merits of the appeal.

I

The government's citation of exhibits which had been marked for identification but not introduced in evidence was the cumulative result of several circumstances. The jurisdictional statement was prepared by attorneys in the appellate section of the Antitrust Division and in the two and a half year interval since the trial had ended, the recollection of the trial staff had become dimmed and the working records which it had maintained during the trial were not adequately studied. Under the practice of the District Court for the Southern District of New York, the exhibits were not part of the physical record, but in this case were returned to the government by the court. The clerk of the district court did not maintain a list or a set of the exhibits which had been admitted in evidence, and the certified record which he transmitted to this Court did not contain either the exhibits themselves or an index to them. Furthermore, the court reporter did not include a table of exhibits in the index to the transcript.

All the exhibits which had been marked for identification at the pre-trial proceedings were bound, consecutively numbered, in several volumes. The attorneys handling the appeal mistakenly assumed that all the documents so bound had been received in evidence.

The error could have been avoided by checking the transcript to find the point at which each exhibit was

admitted. Accordingly, in order to avoid any possible repetition of the error, the government henceforth will cite in its jurisdictional statements the page of the transcript at which each document cited was received in evidence, thus applying the rule applicable to briefs upon a printed record (Rule 40(2)). This procedure should prevent inadvertent reliance upon any documents that were not received in evidence.

II

The mistaken citation of exhibits which had been marked for identification but not received in evidence, has no bearing upon the merits of the case because all of the material facts in our jurisdictional statement are fully supported by other documents which were admitted into evidence.

(a) GX 636, which we did not offer in evidence, is a 1956 publication of Continental intended to promote the use of cans for food. It was mistakenly cited on pages 14, 15–16 and 23 of our Jurisdictional Statement to support the statements that "the 'annual production of the canning industry amounts to more than 20 billion pounds, representing about 8½ percent of the Nation's food supply' and that containers for hermetically-sealed, heat-sterilized food are 'packed in almost 700 million cases or about 20 billion tin and glass containers' "; and that the food canning industry consumes an estimated 35 percent of all metal and glass containers.[1] GX 656, a similar

[1] The percentage was computed by comparing Continental's figure in GX 636 of 20 billion metal and glass containers used in food canning with the total shipments of metal and glass containers in the continental United States (GX 801, table 3a).

1958 publication of Continental, admitted into evidence at Tr. 3569, states substantially the same facts for 1958 as follows:

> The annual production of the canning industry now amounts to more than 22 billion pounds, representing about 8½% of the nation's food supply. This is packed in 700 million cases containing more than 22 billion tin and glass containers.

The 8½ percent and 700 million case figures in the two exhibits are identical. The estimated percentage figure, if based on the admitted exhibit, GX 656, instead of upon the unoffered GX 636, would still have been about 35 percent.

(b) The government introduced in evidence a large number of documents showing that there was active competition between manufacturers of metal and of glass containers in selling and attempting to sell containers to packagers of numerous food items. At page 18 of the jurisdictional statement we mistakenly cited GX 415A, 418, and 421, which had not been offered in evidence. GX 415A and 418 are studies and surveys of the baby food container market prepared for Continental, which reveal that company's interest in increasing its share of that market at the expense of glass containers. GX 421 was an internal memorandum of Continental indicating its interest in entering the field of wine packaging, dominated by glass containers.[2]

[2] GX 421, although not offered in evidence by the government (Tr. 3559–3560), was marked by the court clerk as in evidence (see notation on the original exhibit).

The same active competition by glass and metal container manufacturers, and the attempts of each to sell to packers using the competing containers, are demonstrated by similar documents in evidence which are cited on page 18 of the jurisdictional statement. The baby food market is explored at length in GX 415B, 416, 419, 419A, 419B, 419C, 420.[a] While there is no document in evidence specifically dealing with wine, there are documents in evidence which show Continental's similar interest in packaging tomato catsup, barbecue sauce, chocolate syrup, salad dressings and whipped toppings, referred to on page 18 of the jurisdictional statement. The significant fact is that Continental endeavored to sell metal containers to food packers who were using glass, and the significance of such endeavors is not vitiated by deletion of the reference to wine on page 18.

(c) GX 774 (not offered in evidence) is a letter from the Vice President and General Sales Manager of Hazel-Atlas to one of that company's sales representatives, comparing the prices of its glass containers with competing metal containers. It was mistakenly cited on page 19 of the jurisdictional statement in a paragraph emphasizing the cross-elasticity of demand between glass and metal food containers, and the awareness of the manufacturers of such containers that food processors were prepared to change from one type to another if there was a significant price differential. The same information is provided by

[a] These exhibits were admitted, respectively, at Tr. 2006, 3556, 3558, 1417, 1417, 1417, 3559.

GX 773, 775 and 776, admitted in evidence[4] and cited in the same paragraph; two of them are quoted in footnote 14, page 19. These three documents show that customers of Hazel-Atlas threatened to package their products in metal containers if glass container prices were substantially raised.

(d) The 26 documents cited on page 7 of the appellee's motion (GX 4–1. 15, 17–23, 25–30, 32, 41) which were not offered in e idence, were records of the Glass Container Manufacturers' Institute (GCMI). They were mistakenly cited as examples of the glass-container trade association's efforts to induce the replacement of metal containers with glass. At that point, we were demonstrating that the inter-industry competition found by the court below (J.S. 35a–36a), of which Continental and Hazel-Atlas were a substantial segment, was reflected in the activities of their respective trade associations. The same activity by the glass container association is clearly demonstrated in the similar GCMI exhibits in evidence which are cited on page 19 (GX 1–3; GX 14; GX 24; GX 31; GX 33–40; GX 42–131; GX 304; GX 319–346).[5]

---

[4] These exhibits were admitted, respectively, at Tr. 1549, 1559, and 2122.

[5] These exhibits were admitted in evidence as follows: GX 1–3, Tr. 2329–2330; GX 14, Tr. 2333; GX 16, Tr. 2334; GX 24, Tr. 2334; GX 31, Tr. 2335; GX 33–40, Tr. 2098; GX 42, Tr. 2139; GX 43–55, Tr. 2146; GX 56, Tr. 2151; GX 57, Tr. 2152; GX 58–61, Tr. 2153; GX 62–64, Tr. 2154; GX 65–71, Tr. 2157; GX 72, 73, Tr. 2158; GX 74, Tr. 2159; GX 75, Tr. 2160; GX 76, Tr. 2163; GX 77, Tr. 2164; GX 79, Tr. 2166; GX 80, Tr. 2167; GX 81, 82, Tr. 2168; GX 83, Tr. 2169; GX 84, Tr. 2169; GX 85–131, Tr. 2127; GX 304, Tr. 3586; GX 319–346, Tr. 2110. Although government records indicate that GX 78 was admitted,

(e) GX 414, mistakenly cited at page 17 of the jurisdictional statement, was a proposal by Continental's advertising agency for the introduction of metal containers for soluble coffee. It was offered at the trial, objected to on various grounds and excluded by the district court as cumulative (Tr. 3553–3554). It was cited as one of a list of eleven exhibits relating to the use of metal containers for soluble coffee. Nine of these exhibits, all of which are in evidence (GX 405, 405A, 406, 407, 408, 409, 411, 412, 413)[6] show that Continental did in fact attempt to induce such food processors to convert from glass to metal containers.

The foregoing comparison of the mistakenly cited exhibits with those in evidence clearly demonstrates that our jurisdictional statement presented a fair statement of the "facts material to the consideration of the questions presented" which were supported by the record, as Rule 15(d) requires. The motion to dismiss should be denied.

---

as does the clerk's notation on the original document, and appellee has not contended to the contrary, we are unable to find a reference to this exhibit in the transcript.

[6] These exhibits were admitted in evidence as follows: GX 405 (in part), Tr. 1775; GX 405A, Tr. 520, 614; GX 406, Tr. 3547; GX 407, Tr. 3549; GX 408, Tr. 1777; GX 409, Tr. 1778; GX 411, Tr. 3550; GX 412, 413, Tr. 3553.

The first quotation in footnote 13, page 17 of the Jurisdictional Statement, was mistakenly taken from a part of GX 405, which was not admitted (Tr. 1772). GX 410 was also not admitted into evidence (Tr. 1779), but is identical, except for the name of the person to whom it was sent, with GX 409, which is in evidence (Tr. 1778). These errors were not pointed out by appellee.

III

The motion to affirm rests on a basic misconception of the nature of competition between corporations like Continental and Hazel-Atlas—very large firms in vigorous competition with each other, manufacturing and selling physically different products which are equally adaptable to the needs of a vast number and variety of end users. The antitrust laws express a concern with broader forms of competition than the activities of rival salesmen currently selling the same or similar products. The antitrust laws are equally concerned with maintaining the competition of rival technologies offering, or able to offer, suitable products in the market-place as alternative choices for a substantial body of customers. The adaptability of products like the containers of Continental and Hazel-Atlas to a wide variety of consumer needs means that the independent existence of such concerns is often as beneficial to consumers as if completed products were being sold, because of the continuous pressure not only to increase the use of one type of product at the expense of the other but also to develop new uses.

The failure to appreciate the importance of these forms of competition was the source of the district court's error. Its conclusion that this was "basically * * * a conglomerate combination" rather than a "horizontal combination" between competitors (J.S. App. 38a–39a), notwithstanding its finding of "substantial and vigorous" competition between glass and metal container manufacturers (including Hazel-Atlas and Continental), reflects the mistaken view that the Clayton Act is less concerned with "inter-

industry" competition of the kind described than with simpler phenomena. Several of appellee's contentions reflect the same misconception. For example, it is asserted that our interindustry line of commerce is vitiated by the fact that the glass and metal container companies are in separate recognized industries, that the two types of containers have distinct physical characteristics, and that they are made of different raw materials by means of different manufacturing equipment and processes (Motion, pp. 13, 15–16). These facts show only that glass and metal containers are physically distinct products. They do not touch upon the issue in this case, which is whether, because of the competition between the manufacturers of such products, they form an appropriate single line of commerce within which the anticompetitive consequences of the merger may be evaluated.

Appellee urges (Motion, p. 9) that the case does not present the question whether statistical evidence of market shares in a defined product market must be proved by the government under the Clayton Act. This issue is posed because the district court, although finding that there is "substantial and vigorous" competition between Continental and Hazel-Atlas, was unable to measure this competition in percentage terms which expressed its substantiality. Admittedly, the interindustry nature of the competition makes it difficult to develop the customary market share statistics. We believe, however, that there was ample evidence to show the substantiality of the competition being eliminated between the companies and

that the court erroneously failed to appreciate this. See our jurisdictional statement, pp. 12–14, 20–25.

Finally, appellee attacks at great length (Motion, pp. 9–26) our analysis of perhaps the most significant market in which Continental and Hazel-Atlas compete—the manufacture and sale of containers for food-canning. To refute our proof that food canners consider and use metal and glass containers as reasonably interchangeable, appellee chiefly relies upon evidence that numerous commodities, at a particular time, were distributed predominantly in one type of container rather than in the other. Its primary reliance is upon DX–N, in which a government witness gave his estimates of the extent to which 92 specific commodities (out of 129 suggested by appellees), about 60 of which were food, were packaged in glass and in metal.[7] But in a field where the court found that there are "literally thousands of packers purchasing containers for packaging hundreds of food products" (J.S. App. 81a), such a limited predominance is not persuasive. In any event, analysis of the competition between Continental and Hazel-Atlas must start with the fact that metal and glass containers are adaptable to almost any food use.

[7] DX–N and DX–O were admitted in evidence at Tr. 2107. DX–O was a list of 129 food and non-food products made up by counsel for appellee (Tr. 2103). From this exhibit, the government witness, Cheney, chose 92 products with respect to which he stated that he could give an opinion, with reasonable certainty, based on his recollection (Tr. 2350), of the relative amounts of each which were packed in glass and metal containers. The list of the 92 commodities and his estimates constitute DX–N.

While at any specific time a particular commodity may be sold largely in one type of container, the record shows that the manufacturers of the other type of container continuously attempt to increase their share of the packaging of such products, are ever alert to opportunities to replace the competing container, and, in fact, employ price pressure, innovation of product and extensive advertising in order to do so. In short, this interindustry competition usually takes the form of a manufacturer of one type of container trying to take customers away from manufacturers of the other type. Such activities constitute the actual and potential competition which always exists between metal and glass containers and which was going on between Continental and Hazel-Atlas prior to the acquisition. The existence of that form of competition is not negated by showing that the use of glass or cans was the prevailing practice during particular periods. In the jurisdictional statement, pp. 14–20, we set out in summary form the record basis for our conclusion that the amount of competition in the food canning line, eliminated by the merger, was substantial.

The simple, ultimate question in this case is whether two giant corporations in different industries, each plainly able and ready to meet the needs of many of the same buyers, may combine without violating Section 7 of the Clayton Act.

Probable jurisdiction should be noted.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
WILLIAM H. ORRICK, JR.,
Assistant Attorney General.
LIONEL KESTENBAUM,
MELVIN SPAETH,
ARTHUR J. MURPHY, JR.,
Attorneys.

OCTOBER 1963.

U.S. GOVERNMENT PRINTING OFFICE: 1963